STATE OF MICHIGAN

COURT OF APPEALS

BYRON PEE,

Plaintiff-Appellant,

v

WILLIAM H. IRWIN, DONNA IRWIN, BEVERLY MARION, and FREDERICK MARION, and DELUX RENTAL, INC., d/b/a/ IRWIN & MARION COMPANY,

Defendants-Appellees.

UNPUBLISHED
June 19, 2007

No. 274121
Washtenaw Circuit Court
LC No. 05-001072-NO

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition in favor of defendants in this slip and fall case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion made pursuant to MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). Summary disposition is permitted where the substantively admissible evidence, considered in a light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Plaintiff went to a barbershop on February 10, 2005. As plaintiff left the shop, he fell on black ice on a sidewalk near the building's parking lot. Plaintiff indicated that even though he was looking where he was going, he did not see any ice. He felt the ice on the pavement surface after he fell, rather than observing it with his eyes.

The owners and operators of another business, Delux Rental, Inc., had undertaken to clear ice and snow and maintain sidewalks and parking lots, including the sidewalk where the fall occurred. The walk where plaintiff fell had been salted several hours before plaintiff's accident. Several Delux employees indicated that they saw plaintiff and the sidewalk immediately after plaintiff fell and that they did not observe either ice or snow on the sidewalk.

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. See *id.* at 609-610.

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612-613. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). If such special aspects are lacking, the open and obvious doctrine applies. *Id.* at 519.

Ice and snow, in general, are open and obvious conditions. See *Perkoviq v Delcor Homes—Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002); *Ververis v Hartfield Lanes*, 271 Mich App 61, 67 n 2; 718 NW2d 382 (2006). Photographs[1] demonstrated that the ground around the sidewalk on which plaintiff fell was covered with snow and that the sidewalk itself was wet. Moreover, plaintiff admits in his appellate brief that (1) the day before plaintiff's fall, two inches of snow fell, but the "high temperature from that day was above freezing," and (2) the temperature was below freezing on the day of the fall. Under such circumstances, a reasonable person would realize that the sidewalk could very well be slippery. See *Kenny v Katz*, 472 Mich 929, 929; 697 NW2d 526 (2005). The trial court did not err in finding that the danger presented by the sidewalk was open and obvious. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 240; 642 NW2d 360 (2002).

Moreover, no special aspects made the condition unreasonably dangerous in spite of its open and obvious condition. In our opinion, the ice here did not present a "uniquely high likelihood of harm or severity of harm." See *Lugo*, *supra* at 518-519; see also *Kenny*, *supra* at 929.

Our conclusion that the condition was open and obvious and had no pertinent special aspects renders moot the argument concerning whether defendants had notice of the condition.

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[1] Plaintiff was uncertain in his deposition about the date on which the photographs were taken. Nevertheless, the parties rely in their appellate briefs on the photographs as substantially accurately depicting the location of and conditions surrounding the area of plaintiff's fall. For example, plaintiff states in his brief that "[i]n viewing the photographs of the area of the fall, a down spout can clearly been seen [and] . . . the area around the down spout appears wet."

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood